STATE OF MICHIGAN
IN THE SUPREME COURT

APPEAL FROM THE COURT OF APPEALS
SAAD, P.J., and DONOFRIO and GLEICHER, JJ.

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE, AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA and its LOCAL 6000; MICHIGAN CORRECTIONS ORGANIZATION, SEIU LOCAL 526M; MICHIGAN PUBLIC EMPLOYEES, SEIU LOCAL 517M; and MICHIGAN STATE EMPLOYEES ASSOCIATION, AFSCME, LOCAL 5,

Plaintiffs-appellants,

v.

NATALIE YAW, EDWARD CALLAGHAN, and ROBERT LABRANT, in their official capacities as Members of the Michigan Employment Relations Commission; RICHARD "RICK" SNYDER, in his official capacity as Governor of the State of Michigan; WILLIAM D. SCHUETTE, in his official capacity as Attorney General of the State of Michigan; and STATE OF MICHIGAN,

Defendants-appellees.

Supreme Court No. 147700

Court of Appeals No. 314781

BRIEF ON APPEAL - PLAINTIFFS-APPELLANTS

ORAL ARGUMENT REQUESTED

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STATEMENT OF THE BASIS OF JURISDICTION

Plaintiffs-appellants appeal the Court of Appeals' published decision holding that 2012 Public Act 349 ("PA 349"), the public sector "right to work" law, may constitutionally be applied to the state civil service despite a contrary regulatory decision by the Michigan Civil Service Commission ("Commission") (No. 314781, 302 Mich App 246 (2013)). On 11 September 2013, Plaintiffs-Appellants timely filed an application for leave to appeal. This Court granted leave in an Order dated 29 January 2014. Therefore, this Court has jurisdiction over this appeal pursuant to MCR 7.301(A)(2).

STATEMENT OF QUESTIONS INVOLVED

I.

WHERE THIS COURT HAS CONSISTENTLY INTERPRETED THE LANGUAGE AND HISTORICAL CONTEXT OF CONST 1963 ART 11, § 5 AND ART 4, § 48 TO VEST THE CIVIL SERVICE COMMISSION WITH PLENARY AUTHORITY CONCERNING CONDITIONS OF EMPLOYMENT IN THE CLASSIFIED SERVICE AND TO BAR LEGISLATIVE INTERFERENCE WITHIN THE COMMISSION'S "SPHERE OF AUTHORITY," DOES 2012 PA 349 OVERRIDE THE COMMISSION'S RULES?

Plaintiffs-appellants answer: no.

II.

DOES THE REFERENCE TO "CONDITIONS OF EMPLOYMENT" IN CONST 1963, ART 4, § 49 GIVE RISE TO "SHARED AUTHORITY" BETWEEN THE LEGISLATURE AND THE CIVIL SERVICE COMMISSION, WHERE NO ARTICULABLE, OBJECTIVE STANDARD APPLIES TO DETERMINE HOW AUTHORITY ULTIMATELY IS ALLOCATED?

Plaintiffs-appellants answer: no.

INTRODUCTION AND SUMMARY OF ARGUMENT

On appeal is a split decision of the Court of Appeals holding that 2012 Public Act 349 ("PA 349"), the public sector "right to work" law, may constitutionally be applied to override the Civil Service Commission's plenary authority over the "conditions of employment" in the classified civil service. In the exercise of its authority under Const 1963, art 11, § 5, the Commission has established rules authorizing collective bargaining agreements that require represented employees who choose not to be members of the union to pay their proportionate "fair share" of the cost of union representation. Based largely on Const 1963, art 4, § 49, a little-used Progressive Era clause that focused on hours of work for women and children, that also includes the phrase "conditions of employment," the panel majority concluded that PA 349 invalidates the Commission's "fair share" rule.

To reach that result, the lower court cast aside decades of settled case law upholding the Commission's plenary and exclusive authority to regulate conditions of employment and personnel transactions. Based on the commonly understood words and historical context of art 11, § 5, along with the corresponding carve-out for civil service in art 4, § 48, this Court has drawn a clear line between the Legislature's exercise of its general police powers in the area of employment and the Commission's autonomy regarding on-duty, job-related matters within its plenary sphere of authority. Where the Commission is acting within its sphere of authority, "any executive, legislative or judicial attempt at incursion into that 'sphere' would be unavailing." *Council No 11, AFSCME v Civil Service Comm*, 408 Mich 385, 408; 292 NW2d 442 (1980) ("*Council No 11*") (*quoting*, *Plec v Liquor Control Comm*, 322 Mich 691, 694; 34 NW2d 524 (1948)).

The panel majority proposes to depart from this established approach in order to fit PA 349 within its new theory of "shared authority." The lower court attempts to circumscribe the

Commission's sphere of authority based on a misreading of *Council No 11*. But there should be no question that matters relating to collective bargaining in the civil service lie safely within the Commission's plenary authority to regulate "all conditions of employment" and "all personnel transactions." The lower court's conclusion that the Commission's sphere of authority does not include its collective bargaining rule permitting fair share rule has no support in the abundant case law addressing this subject.

Despite this Court's repeated characterization of the Commission's authority within its sphere as plenary, the panel majority propounds a new concept of "shared authority" insofar as "right-to-work" is concerned. However, PA 349 is an amendment to the Public Employment Relations Act (PERA), MCL 423.201 *et seq*, which was enacted pursuant to the Legislature's authority under art 4, § 48. That clause contains an express carve out for the civil service, in recognition of the fact that the Commission's powers to establish its own employment relations and collective bargaining rules are not "shared" with the Legislature. The lower court's reliance on a handful of Court of Appeals opinions that have applied civil rights and workplace safety legislation to the civil service is misplaced; those decisions were expressly grounded on a countervailing constitutional mandate to the Legislature to implement constitutional protections for all workers. In the absence of any comparable constitutional mandate here, the panel majority relies on art 4, § 49, which provides: "The legislature may enact laws relative to the hours and conditions of employment." Const 1963, art 4, § 49. The historical record and case law make it clear that, while art 4, § 49 was intended to protect fair labor standards laws from a hostile legal regime a century ago, art 4, § 48 is the obvious source of the Legislature's authority to amend PERA to enact "right-to-work." The Constitution's drafters took pains to make it clear that such authority does not extend to the civil service.

Perhaps the most troubling aspect of the ruling below is that the nebulous concept of a "sharing of constitutional responsibilities" between the Commission and the Legislature provides no bright line, no workable test, for allocating constitutional powers. No better example of its dangers can be found than in the panel majority's justification for trumping the Commission's plenary authority where "right-to-work" is concerned. That justification boils down to this: two judges have manufactured a legal controversy regarding fair share agreements and then imputed it to the Legislature. Armed with a "significant public concern" of their own making, the panel majority concluded that the Legislature had good cause to override the Commission. The panel majority's extraordinary theory that the allocation of constitutional authority should be decided based on judges' views about the strength of competing policies is fundamentally at odds with this Court's repeated admonition that the judiciary's role is to apply the words of the Constitution and not to decide policy.

STATEMENT OF MATERIAL PROCEEDINGS AND FACTS

A. The Commission's Plenary Authority Over the Classified Service, and Its Historical Origins.

The Commission's authority to control employment in the classified civil service is set forth in Const 1963, art 11, § 5, which provides in paragraphs 4 and 7:

> The commission shall classify all positions in the classified service according to their respective duties and responsibilities, fix rates of compensation for all classes of positions, approve or disapprove disbursements for all personal services, determine by competitive examination and performance exclusively on the basis of merit, efficiency and fitness the qualifications of all candidates for positions in the classified service, make rules and regulations covering all personnel transactions, and regulate all conditions of employment in the classified service.
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> * * *
>
> Increases in rates of compensation authorized by the commission may be effective only at the start of a fiscal year and shall require prior notice to the governor, who shall transmit such increases to the legislature as part of his budget. The

> legislature may, by a majority vote of the members elected to and serving in each house, waive the notice and permit increases in rates of compensation to be effective at a time other than the start of a fiscal year. Within 60 calendar days following such transmission, the legislature may, by a two-thirds vote of the members elected to and serving in each house, reject or reduce increases in rates of compensation authorized by the commission. Any reduction ordered by the legislature shall apply uniformly to all classes of employees affected by the increases and shall not adjust pay differentials already established by the civil service commission. The legislature may not reduce rates of compensation below those in effect at the time of the transmission of increases authorized by the commission.

Const 1963, art 11, § 5, ¶s 4 and 7.

The Commission's independence from the Legislature was established in response to inefficiencies and unfairness caused by political interference with state employment. In 1936 the Governor's Civil Service Study Commission condemned the longstanding "spoils" or "patronage system" in state employment. It recommended that a state civil service system be established by legislation. *Council No 11*, 408 Mich at 397. The Legislature did so with 1937 PA 346. However, in 1939 the Legislature weakened the civil service system by passing laws "designed primarily to destroy the civil service system which had just been established" and that had succeeded in "badly crippling" it. *Id.* at 399. *See AFSCME Council 25 v State Employees' Retirement System*, 294 Mich App 1, 10; 818 NW2d 337 (2011), *lv denied*, 490 Mich 935 (2011) (detailing the Legislature's "dismantling" of the Commission).

In response, on 5 November 1940, the people of Michigan by initiative petition "adopted a constitutional amendment establishing a constitutional state civil service system, superseding the 1939 legislation." *Council No 11*, 408 Mich at 400-401. This amendment became art 6, § 22 of the 1908 Constitution. Its language was identical to art 11, § 5, ¶ 4 quoted above.[1]

[1] The 1941 amendment to the 1908 Constitution did not provide for any legislative oversight of the Commission. The 1963 Constitution added a "narrowly drawn" legislative veto over

B. The Commission's Regulation of Collective Bargaining.

Exercising its plenary authority over employment in the classified service, the Commission has promulgated administrative rules and regulations governing, *inter alia*, appointment and selection criteria for classified employment, classification of new and existing positions, compensation and fringe benefits, and collective bargaining. With respect to the latter, Commission Rule 6-2.1 generally authorizes collective bargaining for civil service employees.[2] Further, the Commission has authorized, in Rules 6-7.2 through 6-7.6, the negotiation of "fair share" agreements, under which classified employees are free to join the union that represents their bargaining unit and pay membership dues, or not join the union and pay a fee representing their proportionate fair share of the costs of union representation.

The Commission's rules place limitations on the amount of the fair share fee an employee can be required to pay. These rules conform to the standards for agency fees that have been laid out by the federal courts. Rule 6-7.3 limits the fee to the employee's proportionate share of the "costs germane to collective bargaining, contract administration, grievance adjustment, and any other cost necessarily or reasonably incurred for the purpose of performing the duties of an exclusive representative of the employees in dealing with the employer on labor-management issues." Rule 6-7.4 gives employees the right to object to the amount of the fair share fee, to

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compensation, providing that the Legislature may override the Commission's determination of rates of compensation by a two-thirds majority vote of the members in each house. *Mich Ass'n of Gov't Employees v Civil Service Comm,* 125 Mich App 180, 189; 336 NW2d 463 (1983). The framers recognized how narrowly they had drawn the legislature's powers, noting that the two-thirds requirement would mean the veto power "could not be exercised readily" and would only be exercised "in the event of a real abuse." 1 Official Record, Constitutional Convention 1961, p 652.

[2] The Commission's Rules are available at: http://www.michigan.gov/documents/mdcs/Michigan_Civil_Service_Commission_Rules_347183_7.pdf

obtain detailed financial information substantiating the amount, and the right to challenge the amount before an impartial decision maker while the employee's fees are set aside in escrow. The Rules also require that notice of employees' right to object be posted in every workplace. Rule 6-7.5. Each union must provide the State Employer with detailed, audited financial statements supporting the fair share fee calculation. Rule 6-7.6.

Consistent with the Commission's rules, plaintiffs-appellants have negotiated dues and fair share agreements with the State of Michigan covering the classified employees that they represent. These fair share agreements are included in labor contracts currently in effect, and plaintiffs-appellants intend to continue to negotiate such agreements in future contracts, subject to Commission rules and regulations.

C. 2012 PA 349

On 11 December 2012, the Legislature enacted, and Governor Snyder signed, enrolled House Bill 4003, which became PA 349, effective 28 March 2013. PA 349 amended the Public Employment Relations Act ("PERA"), MCL 423.201 *et seq.* Under PERA, the Michigan Employment Relations Commission is given authority for enforcing PA 349. PA 349 provides for civil fines for violation, and also creates a private right of action for damages, injunctive relief, and attorney fees. MCL 423.210(8) and (10).

PA 349 amends Section 10 of PERA to prohibit fair share or agency fee agreements covering public employees, with the exception of public police and fire department employees and state troopers and sergeants. MCL 423.210 (3) and (4). However, PA 349 did not amend Section 4a of PERA, which provides, "The provisions of this act as to state employees within the jurisdiction of the civil service commission shall be deemed to apply in so far as the power exists

in the legislature to control employment by the state or the emoluments thereof." MCL 423.204a.

On 28 January 2013, the Governor requested an advisory opinion from this Court on several questions, chief among which was whether PA 349 is applicable to the civil service. *In re Request for Advisory Opinion Regarding Constitutionality of 2012 PA 348 and 2012 PA 349* (case no 146595). On 5 July 2013, this Court denied the request. 494 Mich 876 (2013).

D. Proceedings Below

On 14 February 2013, plaintiffs-appellants commenced an action in the Court of Appeals as required by PA 349. Plaintiffs-appellants requested a declaration that PA 349, as applied to the classified civil service, violates art 11, § 5 and art 4, § 48 of the Michigan Constitution, and Section 4a of PERA. The Commission filed a brief *amicus curiae* arguing that PA 349 is an unconstitutional usurpation of its plenary authority under art 11, § 5, to the extent that it would apply to override the Commission's rules.

The Court of Appeals issued its opinion on 15 August 2013. In a 2-1 decision written by Judge Henry Saad and joined by Judge Pat Donofrio, the panel majority concluded that PA 349 is a valid exercise of legislative authority because Const 1963 art 4, § 49 grants the Legislature the general power to enact laws concerning conditions of employment over all employees, which trumps the Commission's specific constitutional authority under art 11, §5 to "regulate all conditions of employment in the classified service." Judge Elizabeth Gleicher dissented, concluding that the Legislature does not have constitutional authority to override the Commission's decision concerning a condition of employment in the civil service.

On 11 September 2013, Plaintiffs-appellants sought this Court's leave to appeal the decision below. The Court granted leave on 29 January 2014.

ARGUMENT

I. THE CIVIL SERVICE COMMISSION'S CONSTITUTIONAL POWERS ARE PLENARY WITHIN ITS "SPHERE OF AUTHORITY".

Since the Civil Service Commission's inception in 1941, this Court has recognized consistently that it is a unique constitutional body with a clearly defined purpose, and that the Commission's control of matters falling within its sphere of authority is absolute and inviolate from interference by the Legislature.

This Court heard the first test of the new constitutional body just a year after the voters approved Const 1908, art 6, § 22, when classified employees sued on behalf of themselves and some 2,700 cohorts challenging the Commission's rule requiring that they take competitive examinations to retain their State positions. *Reed v Civil Service Commission*, 301 Mich 137; 3 NW2d 41 (1942). Citing the checkered history of legislative tampering with the classified service, this Court observed:

> We must conclude that the civil service amendment was written into the fundamental law in part at least because of popular dissatisfaction with then existing conditions. It is a proper inference that the citizens of Michigan may have desired and intended to bring about a betterment in administration of State employment civil service.

Id. at 154. The Court recognized that the amendment's articulation of the Commission's mandate, which continues today in art 11, § 5, in virtually identical form, supplanted the pre-amendment era of legislative co-regulation of the civil service:

> The new commission had to look only to the amendment itself for its powers, duties and limitations. All previous legislative acts were superseded. Previous commissions and their official acts were wiped out.

Id. at 156. A unanimous Court ordered dismissal of the complaint. The concurrence added:

> Unquestionably the civil service commission is a constitutional body possessing plenary power. In its acts it is not subject to control or regulation by either the executive, legislative or judicial branch of our State government.

Id. at 163 (Chandler, CJ, concurring).

Just a few years later, this Court declared: "[T]he civil service commission by the above mentioned constitutional amendment is vested with plenary powers in its sphere of authority." *Plec v Liquor Control Comm*, 322 Mich 691, 695; 34 NW2d 524 (1948).

In *Viculin v Dep't of Civil Service*, 386 Mich 375; 192 NW2d 449 (1971), this Court made it clear that "plenary" as used to describe the Commission's powers within its sphere of authority is synonymous with *exclusive*:

> The Civil Service Commission is a constitutional body possessing plenary power and may determine, consistent with due process, the procedures by which a state civil service employee may review his grievance. [citations omitted] The legislature is consequently without power to regulate the internal procedures of the Civil Service Commission...

Id. at 393.

> The Michigan Civil Service Commission has plenary and absolute powers in its field.

Id. at 398.

The Court expounded further in *Council No 11, AFSCME v Civil Service Comm*, 408 Mich 385, 408; 292 NW2d 442 (1980), addressing specifically legislative interference in the Commission's control over those matters constitutionally assigned to its supervision:

> We do not wish to be understood as qualifying in any way this Court's earlier holding that 'the Civil Service Commission by [the constitutional grant of authority] is vested with plenary powers in its *sphere of authority*.' (Emphasis added.) [*Plec v Liquor Control Comm*] Since that grant of power is from the Constitution, any executive, legislative or judicial attempt at incursion into that 'sphere' would be unavailing.

Id. at 408.[3]

[3] The term "plenary" has a well understood meaning. "[F]ull, complete; entire <plenary authority>" *Black's Law Dictionary*, (3d Pocket Ed.); "Full; complete; entire; absolute;

Faithfully following the road map this Court has laid out, the Court of Appeals[4] and the Attorney General[5] have applied the foregoing principle in a variety of circumstances.

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unqualified." *Random House Dictionary of the English Language*; "complete in all aspects or essentials; full" *American Heritage Dictionary* (2d College Ed. (1985); "Complete, entire, perfect" *The Oxford EnglishDictionary*. Courts also have used the term "exclusive" to describe the Commission's constitutional authority. *E.g.*, *Crider v Michigan*, 110 Mich App 702, 725; 313 NW2d 367 (1981); *AFSCME Council 25 v State Employees' Ret Sys*, 294 Mich App 1, 18; 818 NW2d 337 (2011), *lv denied,* 490 Mich 935 (2011)(quoting *Crider*).

[4] Until now, the Court of Appeals has over the years consistently followed this Court's guidance faithfully. *E.g.*, *Michigan Coalition of State Employee Unions v State of Michigan,* 302 Mich App 187; 838 NW2d 708 (2013), *lv app granted* (SC No. 147758)(statute requiring classified employees in defined benefit pension plan to choose either to contribute four percent of their income to that plan or switch to the 401(k) plan and changing the way overtime is applied to calculation of "final average compensation" is unconstitutional because it constituted change in "condition[s] of employment" within the authority of Commission, not the Legislature); *Attorney General v Civil Serv Comm*, No. 306685, 2013 Mich App LEXIS 16 (2013) (unpublished), *lv denied,* 493 Mich 974 (2013) (extension of state health plan to other eligible adult individuals constituted compensation and was thus within the "plenary and exclusive" jurisdiction of Commission); *AFSCME Council 25 v State Employees' Ret Sys*, 294 Mich App 1; 818 NW2d 337 (2011), *lv denied*, 490 Mich 935 (2011) (statute requiring classified employees to contribute three percent of their compensation to a retirement health care fund unconstitutional as within plenary authority of Commission); *York v Civil Serv Comm*, 263 Mich App 694, 700; 689 NW2d 533 (2004) (Commission has "broad authority to regulate the state classified service" and has power that is "absolute" and "plenary."); *Hanlon v Civil Serv Comm*, 253 Mich App 710, 717-18; 660 NW2d 74 (2002) ("the CSC has broad authority to regulate the state classified service" and has "plenary authority."); *Womack-Scott v Dep't of Corr,* 246 Mich App 70, 79; 630 NW2d 650 (2001) (Commission "regulates the terms and conditions of employment in the classified service and has plenary and absolute power in that respect."); *MSEA v Civil Serv Comm*, 220 Mich App 220, 223; 559 NW2d 65 (1996) ("Pursuant to Const 1963, art 11, §5, the Civil Service Commission has plenary authority to regulate the conditions of employment for classified state employees.") *Livingston Co Bd of Soc Servs v Dep't of Soc Serv,* 208 Mich App 402, 408; 529 NW2d 308 (1995) ("Because the [Commission's] grant of power is derived from the constitution, its valid exercise of power cannot be taken away by the legislature."); *Dept of Social Services v Kulling*, 190 Mich App 360; 475 NW2d 464 (1991)(holding that the standards of conduct for public officers and employees act, MCL 15.341 *et seq*, could not constitutionally be applied to provide a classified employee with a civil cause of action against his employer outside of civil service procedures, based on art 11, § 5 and art 4, § 48); *Crider v Michigan*, 110 Mich App 702, 723; 313 NW2d 367 (1981)(rejecting argument that Commission's layoff of classified employees was subject to governor's and legislature's control under art 5, § 20, stating: "[I]f the CSC's implementation of the layoff plan was permissible under art 11, § 5, it is not necessary for us to consider the effect of the failure of the Governor to comply with the conditions of art 5, § 20 of the Michigan Constitution. This follows by virtue of the fact that it is

The panel majority now has charted an entirely different course. As discussed below, a straightforward application of the case law leads to the conclusion that the Commission's fair share collective bargaining rule lies safely within its "sphere of authority," and accordingly that the Commission's judgment regarding that internal personnel matter is not subject to legislative interference or "co-regulation." The panel majority's argument for deviating from settled law rests precariously on two fundamental errors. The first is an unnaturally cramped re-definition of the Commission's "sphere of authority." The second is a novel theory of expansive -- indeed, virtually unbounded -- legislative power to regulate internal matters in the classified service

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the Civil Service Commission, and not the Legislature, that is given 'supreme power' over civil service employees under art 11, § 5. [citation omitted]").

[5] Consistent with the decisions of Michigan courts, the Attorney General has opined repeatedly that the Commission has plenary authority to regulate various conditions of employment in the classified service, and therefore the Legislature has no authority to regulate state employees' conditions of employment. *See, e.g.*, OAG No 5480 (27 March 1979) (Commission "has the power to adopt rules which may incorporate legislative enactments *in toto*, in part or not at all"); OAG No 6027 (January 1982) (Commission "establishes the terms and conditions of employment within the classified service," and under such authority has power to determine royalties state employees may receive from inventions developed in the course of their employment and patented by the state); OAG No 6003 (October 1981) (Commission's plenary authority over conditions of employment includes power to subpoena witnesses to appear and give testimony in cases before the Commission); OAG No 5736 (July 1980) (proposed legislation purporting to prohibit discipline by employers against whistleblowers "in so far as they pertain to employees in the classified service, would violate Const 1963 art 11, § 5. The Legislature is without authority to regulate conditions of employment of employees in the classified state service. It has no authority to regulate dismissals and discipline within the classified state service and to enable classified employees to file specified original actions in court in derogation of the grievance procedure established by the Civil Service Commission"); OAG No 5663 (February 1980) ("Classified Executive Service" plan proposed by Legislature as separate merit system for higher level managers in the state workforce would encroach on Commission's plenary power over conditions of employment, and therefore "does not conform to the Civil Service system which the people have established in our Constitution"). *See also, Report of the Michigan Citizens Advisory Task Force on Civil Service Reform: Toward Improvement of Service to the Public* (July 1979) at p 12 ("The final decision-making power vested by the Michigan Constitution in the Commission generally is exercised by the legislature of other states which have authorized collective bargaining for their state employees. In Michigan, the Commission exercises the function of determining the terms and conditions of employment in the classified civil service usually performed by the legislature in other states.")

based on Const 1963, art 4, § 49. Both of these propositions, applied by the court below to 2012 PA 349, undermine decades of settled law.

II. THE COMMISSION'S RULES GOVERNING COLLECTIVE BARGAINING FOR STATE EMPLOYEES, INCLUDING THE FAIR SHARE RULE AT ISSUE, ARE WITHIN ITS CONSTITUTIONAL "SPHERE OF AUTHORITY."

A. The Panel Majority Takes a Limited View of the Commission's Sphere of Authority Which Is At Odds With the Wording and This Court's Interpretation of Art 11, § 5.

The majority opinion below adopts a circumscribed view of the Commission's constitutional mandate and its sphere of plenary authority. The panel majority appears to adopt the position that Commission rules implementing certain functions are entitled to greater protection from legislative interference as compared to its collective bargaining rules: "[O]ur dissenting colleague gives the impression that agency fees are akin to Commission rules requiring a certain educational degree for promotion, specifying procedures for drafting qualifying examinations, or establishing job performance ratings." *Id.* at 279. While giving lip service to the settled law that the Commission's power within its sphere of authority is "broad and exclusive," *Id.* at 268, in reality the panel majority adopts a hierarchy of plenary authority in which some powers are more plenary than others.

The words of art 11, § 5, ¶ 4 admit of no such limiting interpretation:

> The commission shall classify all positions in the classified service according to their respective duties and responsibilities, fix rates of compensation for all classes of positions, approve or disapprove disbursements for all personal services, determine by competitive examination and performance exclusively on the basis of merit, efficiency and fitness the qualifications of all candidates for positions in the classified service, make rules and regulations covering all personnel transactions, and regulate all conditions of employment in the classified service.

Const 1963, art 11, § 5, ¶4. Const 1963, art 11, § 5 as a whole suggests no sharing of these functions with the Legislature, other than in one "narrowly drawn" exception, added in the 1963

Constitution. Paragraph 7 permits the legislature, by a supermajority vote of both houses, to override a pay increase approved by the Commission. *See, Mich Ass'n of Gov't Employees v Civil Service Comm,* 125 Mich App 180, 189; 336 NW2d 463 (1983) (describing ¶7 as giving the legislature a "narrowly drawn veto power"). The framers were conscious of how narrowly they had drawn the Legislature's powers, noting that the two-thirds requirement would mean the veto power "could not be exercised readily" and would only be exercised "in the event of a real abuse." *Id.* at 186-189; *see*, 1 Official Record, Constitutional Convention 1961, p 652.

This Court gave further definition to the scope of the Commission's authority in *Council No 11, supra.* At issue was "a conflict between the rule-making power of the Michigan Civil Service Commission and the law-making power of the Legislature . . . ." *Council No 11*, 408 Mich at 390. The Michigan Political Freedom Act, 1976 PA 169, MCL 15.401 *et seq.*, expressly permits a classified employee to join a political party and attend its meetings and conventions as a delegate, MCL 15.402(a), (b), and to become a candidate without first obtaining a leave of absence. MCL 15.402(c). The Commission's Rule 7.1 forbade employees from becoming a member or officer of a political party or serving as a party convention delegate; Rule 7.3 required an employee to first obtain leave before becoming a candidate. Following a lengthy recounting of the history of Michigan's civil service, the Court gave greater precision to the constitutional grant of Commission authority to "regulate all conditions of employment in the classified service" as follows:

> We do not question the commission's authority to regulate employment-related activity involving internal matters such as job specifications, compensation, grievance procedures, discipline, collective bargaining and job performance, including the power to prohibit activity during working hours which is found to interfere with satisfactory job performance. This Court has said as much in *Viculin v Dep't of Civil Service*, 386 Mich 375; 192 NW2d 449 (1971).

Council No 11, 408 Mich at 406-407.

B. The Commission's Rule Permitting Fair Share Agreements Is Within Its Sphere of Plenary Authority Under Art 11, § 5.

Commission Rule 6-7.2 authorizing fair share agreements falls squarely within the arena of on-duty employment-related activity that is the Commission's exclusive purview. "Collective bargaining" is one of the "employment-related activit[ies] involving internal matters" that the Court identified in *Council No 11* as within the Commission's "sphere of authority." Negotiation of a fair share clause in a collective bargaining agreement unquestionably establishes a "condition of employment" for classified employees. Rule 6-7.2 also is a rule "covering...personnel transactions." Assuming "transaction" is given its commonly understood meaning, the State employer's deduction of union dues or fair share fees from an employee's paycheck and the remittance of that amount to an employee organization, pursuant to a negotiated fair share clause, meets the commonly understood definition of a "personnel transaction."

As a general matter, with respect to its rules governing collective bargaining, the Commission's powers are comparable to those of the Legislature under Const 1963, art 4, § 48 as to the rest of the public sector. The Legislature has exercised its constitutional authority under art 4, § 48 by enacting PERA; the Commission has implemented its corollary authority with respect to the classified service by promulgating its collective bargaining rules. This Court has made it clear that the Legislature's power to regulate non-classified employee labor disputes and the Commission's authority to regulate collective bargaining under art 11, § 5 do not overlap -- and in fact they are mutually exclusive. In ruling that the Michigan Administrative Procedures Act does not override the Commission's rules governing internal employee appeals, this Court said:

> The Civil Service Commission is a constitutional body possessing plenary power and may determine, consistent with due process, the procedures by which a state civil service employee may review his grievance. Const 1963, art 11, § 5 [other citations omitted] The legislature is consequently without power to regulate the internal procedures of the Civil Service Commission and this fact is recognized in Const 1963, art 4, § 48: 'The legislature may enact laws providing for the resolution of disputes concerning public employees, *except those in the state classified civil service*." (Emphasis added.) It is plain that if the administrative procedures act was intended to apply to the resolution of disputes in the state classified civil service, it would be in violation of this provision of the constitution. It cannot, therefore, apply to the internal procedures of the Civil Service Commission . . . .

Viculin v Dep't of Civil Service, supra, 386 Mich at 393-394.

It should come as no surprise, then, that matters such as those covered by PERA for the rest of the public sector are "conditions of employment" and "personnel transactions" subject to the Commission's exclusive authority as to the civil service. The Court of Appeals recognized that fair share agreements are among the conditions of employment controlled by the Commission in *Dudkin v Mich Civil Service Comm*, 127 Mich App 397, 407-409; 339 NW2d 190 (1983). In rejecting employees' procedural objection that they were not given individual notice of the Commission's promulgation of the precursor to Rule 6-7.2, the court explained: "[T]he Commission has plenary power over all aspects of civil service employment. [citing *Viculin v Dep't of Civil Service* and *Crider v Michigan*]. Const 1963, art 11, § 5 empowers the commission to make rules and regulations covering all personnel transactions and conditions of employment." *Id.* at 407.[6] In recognizing the agency fee agreement as within the Commission's sphere of authority, the Court of Appeals noted that, "imposition of agency shop fees on

[6] The court also rejected plaintiffs' objection that they could not be discharged for failure to meet their fair share obligations because the Commission is limited to terminating employees based solely on "merit, efficiency, and fitness." The court noted that, "[d]esignation of an exclusive representative and imposition of an agency shop fee clearly bears on the efficiency of civil service operations."

nonunion members has been upheld in the public employee context." *Id.* at 409 (citing *Abood v Detroit Bd of Ed*, 431 US 209 (1977) and *Eastern Michigan Univ Chapter of American Ass'n of Univ Professors v Morgan*, 100 Mich App 219; 298 NW2d 886 (1980)).

While the panel majority correctly observes that *Dudkin* did not involve a conflict between a legislative enactment and a Commission rule, because at that time PERA permitted agency fee agreements, 302 Mich App at 281, that is beside the point. The salient point is that under *Viculin* and *Council No 11*, once the matter of fair share fees is determined to be a condition of employment for purposes of art 11, § 5, the Legislature may not override the Commission's rulemaking simply because it now has adopted a different policy. As this Court said in *Viculin* -- which *did* involve a conflict between legislation (the MAPA) and the Commission's internal rules concerning employee grievances -- "[t]he legislature is...without power to regulate the internal procedures of the Civil Service Commission." *Viculin*, 386 Mich at 393.[7]

Michigan courts have held without exception that other aspects of collective bargaining for classified employees are within the exclusive purview of the Commission. For example, in *Bonneville v Michigan Corrections Org*, 190 Mich App 473; 476 NW2d 411 (1991)(*per curiam*), the Court of Appeals held that a classified employee's claim against a union for breach of the duty of fair representation is to be decided exclusively under the Commission's collective bargaining rules. *Id.* at 475. The court also dismissed the argument that the Circuit Court had concurrent jurisdiction with the civil service administrative body to decide the fair representation

[7] The court below also noted that, "*Dudkin* was decided at a time when our Legislature explicitly permitted governmental employers and unions to impose agency fees on public employees under the former version of MCL 423.210(1), but this is no longer the law." 302 Mich App at 280. However the legislature's constitutional authority to enact that change into law arises from art 4, § 48, which, as recognized in *Viculin*, also deprives the legislature of authority to override the Commission's internal rules. *Viculin*, 386 Mich at 393.

claim, as is the case under PERA, stating, "classified civil service employees are not covered by the PERA. As discussed above, the Civil Service Commission has constitutionally mandated power over its employees and has ultimate authority to establish grievance procedures for them." *Id.* at 477 (distinguishing *Demings v Ecorse*, 423 Mich 49; 377 NW2d 275 (1985)); *accord*: *James v Michigan Dep't of Mental Health*, 145 Mich App 229, 231; 377 NW2d 824 (1985) (*per curiam*) (holding Court of Claims lacked jurisdiction over action challenging termination in violation of labor agreement and union's fair representation duty, explaining: "As an employee of the state, the terms and conditions of plaintiff's employment were subject to the authority and control of the Civil Service Commission. [citing art 11, § 5 and *Dudkin*]. The commission has constitutional authority to define the procedure for resolution of employment disputes in the state classified service.") In *Civil Service Comm v Local 1342, AFSCME*, 32 Mich App 104; 188 NW2d 219 (1971), the court held that the Commission could not suspend payroll deduction of union dues in response to a work stoppage, not because it did not have the constitutional power to do so, but because under its own rules the Commission's sole recourse was to withdraw recognition. While acknowledging the Commission's argument that dues checkoff is a "condition of employment" for purposes of defining the Commission's powers under art 11, § 5, the court held the Commission to its own rule, which provided for checkoff without exception. *Id.* at 106-107. And in *SEIU Local 79 v State Racing Comm'r*, 27 Mich App 676; 183 NW2d 854 (1970), the court held that the Michigan Employment Relations Commission did not have authority to determine questions concerning union representation of veterinarians working for the State Racing Commission, because as employees of a state agency they were under the Commission's exclusive jurisdiction "to set conditions of employment for state employees." *Id.* at 680. The court noted that under art 4, § 48, "[t]he power of the legislature to enact laws

regarding disputes concerning public employees is limited by the Constitution" and does not extend to civil service employees. *Id.* at 680-681. Implicit in the court's analysis was the non-controversial understanding that matters of union representation and collective bargaining relate to "disputes concerning public employees."

C. The Panel Majority's Attempt to Shrink the Commission's Sphere of Authority Based on Wording Is Flawed; The Term "Regulate" As Used In Art 11, § 5 Does Not Express An Intention to Confer a Power Subordinate to the Legislature's.

The panel majority justified subordinating the Commission's exclusive and plenary power to legislative enactments based on the term "regulate" as used in art 11, § 5. Citing to a dictionary definition, the majority concluded that "the ordinary meaning of the word 'regulate' is to govern, direct, or control *according to rule, law, or authority*,'" and since both art 11, § section 5 and art 4, § 49 use the phrase "conditions of employment," the Commission's authority in that area must be subordinate to the Legislature's. "Therefore, the Commission's power to issue rules governing civil service employment is not limitless in scope, but is subject to and in accordance with the Legislature's power to 'enact laws' regarding 'conditions of employment.' Const 1963, art 4, § 49." 302 Mich App at 265 (emphasis in original).

This reading of the phrase "regulate all conditions of employment" is novel. For decades this Court and others have analyzed and discussed the Commission's sphere of authority and its plenary powers. Until the ruling on appeal, no court has suggested that some of those powers are more plenary than others. No distinction has been drawn between the Commission's mandate to "regulate" and its corollary mandate to "classify," "fix," "approve or disapprove," "determine," and "make rules and regulations."[8] No such distinction would have occurred to the drafters or to

[8] It should be added here that if the court below is correct, the Commission's authority to "make rules and regulations" concerning all personnel transactions also should be given a meaning

the citizens at the polls in 1940 and 1963. Voters would have understood the term "regulate" as used in connection with "all conditions in the classified service" to be as absolute, exclusive and plenary as the other verbs used by the drafters. The panel majority's distinction between "enact laws" and "regulate" is at odds with the "common understanding" of those words.

The panel majority's reading of "regulate" might resonate with that small percentage of the population conversant with the intricacies of administrative law.[9] But it is belied by standard usage throughout the Constitution. Const 1963 art 4, § 50 confers on the Legislature the power to "...provide safety measures and regulate the use of atomic energy and forms of energy developed in the future..." There is no question that final authority concerning atomic energy resides with the Legislature. Const 1963, art 2, § 4 provides the Legislature with power to "enact laws to regulate the time, place and manner of all nominations and elections...," assuming that enactment and regulation are synonymous. Const 1963, art 4, § 43 recognizes the Legislature's authority to enact laws "regulating" trust companies and corporations for banking. The Legislature's authority under these provisions is not subordinate to any superior body. "Enact" as used in these clauses is simply the method for effectuating the Legislature's ultimate power to "regulate."

More fundamentally, the use of the word "regulate" to establish the Commission's authority concerning conditions of employment could not possibly have signified to the drafters or to the ratifiers that the Commission's regulatory role would be subordinate -- simply to

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consonant with the Administrative Procedures Act, so the Commission's powers here, too, would be subordinate to the Legislature's.

[9] In *Viculin*, this Court suggested that the Commission is not an administrative agency that promulgates regulations in the sense contemplated by the Administrative Procedures Act (defining "rule" as "every regulation, standard...adopted by and agency...to implement or make specific the law enforced or administered by it..."). *Viculin*, 386 Mich at 394, n 17 (quoting MAPA Sec. 7, MCL 24.207).

implement legislative imperatives. The whole point of the Constitution's civil service provision was to establish a classified civil service independent from legislative control.[10]

And finally, the Commission's authority to "make rules and regulations covering all personnel transactions" arguably covers the collective bargaining rules permitting fair share agreements. The employer's deduction of union dues or agency fees from employees' pay and its remittance of those amounts to a labor organization are "personnel transactions" as to which the Commission has made rules and regulations.

III. THE LEGISLATURE DOES NOT HAVE CONSTITUTIONAL AUTHORITY TO OVERRIDE THE COMMISSION'S PLENARY POWER TO REGULATE COLLECTIVE BARGAINING, INCLUDING THE COMMISSION'S FAIR SHARE RULE.

A. The Constitutional Basis for PA 349 Is Section 48 of Article 4, Not Section 49.

The panel majority below recognized that, "PA 349 is an amendment of PERA, which was enacted in 1965 pursuant to the 'explicit constitutional authorization' in Const 1963, art 4, § 48." 302 Mich App at 258. This Court has recognized that PERA was enacted pursuant to the Legislature's authority under art 4, § 48. *Local 1383, Int'l Ass'n of Fire Fighters v City of Warren*, 411 Mich 642, 651, 664; 311 NW2d 702 (1981) ("Acting pursuant to this explicit

[10] Drawing from an aside in *Council No 11*, the panel majority also notes that, "if agency fees are a condition of employment, as plaintiffs suggest, they are also, undoubtedly, a condition *for* employment when an employee may be terminated for failure to pay. In *Council No 11*, our Supreme Court made clear that the CSC may regulate conditions *of* employment, not conditions *for* employment, which are matters are for the Legislature." 302 Mich App at 277 (citing *Council No 11*, 408 Mich at 406). The distinction makes little sense in this context. Clearly, as discussed above, collective bargaining in the civil service touches on conditions *of* employment (for example, work schedules and vacations) as well as conditions *for* employment (such as rules of conduct, discharge grievances, layoff and recall). In *Dep't of Social Services v Kulling*, 190 Mich App 360; 475 NW2d 464 (1991), the court held that the Legislature's enactment of a code of conduct for public officials could not be applied to the civil service. The code of conduct functioned both as a condition *of* employment and a condition *for* employment.

constitutional authorization, PERA was enacted by Legislature in 1965…it is significant to note that article 4, §48 couched in sweeping language the power of the Legislature to enact laws regarding public employee's disputes."). *See also, AFSCME Council 25 v Wayne Co*, 292 Mich App 68, 84; 811 NW2d 4 (2011).

Const 1963, art 4, § 48 expressly carves out the civil service from legislative control ("…except those [disputes] in the classified civil service.") Based on that express limitation on legislative power, this Court has held that classified civil service employees are not covered by PERA. *In the Matter of the Petition for a Representation Election Among Supreme Court Staff Employees*, 406 Mich 647, 667-68; 281 NW2d 299 (1979 ("the Legislature may by legislation regulate the employer-employee relationship where public employees, other than civil servants, are concerned." Coleman, CJ, concurring); *Central Michigan Univ Faculty Ass'n v Central Michigan Univ*, 404 Mich 268, 280-81; 273 NW2d 21 (1978) ("Clearly, the PERA was intended to cover all public employees except for civil service employees specifically excluded by constitutional provision."); *Bd of Control of Eastern Michigan Univ v Labor Mediation Bd*, 384 Mich 561, 566-67; 184 NW2d 921 (1971) ("The public policy of this state as to labor relations in public employment is for legislative determination. The sole exception to the exercise of legislative power is the state classified service, the scheme for which is spelled out in detail in Article 11 of the Constitution of 1963."). *See also, Local 1383 Int'l Ass'n of Fire Fighters*, supra, 411 Mich at 665 ("The only disputes excepted [from Legislative power under art 4, § 48] are 'those in the *state* classified civil service.'") (emphasis in original).

As mentioned above, based on the express limitation on legislative power in art 4, § 48, this Court stated in *Viculin v Dep't of Civil Service*, *supra*, that "[t]he legislature is consequently without power to regulate the internal procedures of the Civil Service Commission and this fact

is recognized in Const 1963, art 4, § 48." *Viculin*, 386 Mich at 393. *See also*, *Bonneville*, 190 Mich App at 477; *Welfare Employees Union v Civil Service Comm,* 28 Mich App 343, 352; 184 NW2d 247 (1970). Other than the decision now on appeal, there is no case approving the application of any provision of PERA to the civil service.

To get around the undeniable fact that PA 349 amends PERA and that PERA does not apply to the classified service, the panel majority posits the following:

> The plain and unambiguous language of article 4, § 48 grants the Legislature the power to enact a statutory scheme for resolving public-sector-employee disputes that arise outside the classified civil service. Clearly, PA 349 does not address resolution of public employee labor disputes and therefore does not come within the article 4, § 48 restriction.

302 Mich App at 259. That conclusion is anything but self evident.

Public Act 349 clearly *does* address resolution of labor disputes. The "resolution of disputes" referred to in art 4, § 48 encompasses a wide array of employment relations mechanisms, including collective bargaining. *Detroit Fire Fighters Ass'n v City of Detroit*, 408 Mich 663, 723; 293 NW2d 278 (1980) ("We garner from the literal language of this state's labor regulatory scheme a legislative preference for the voluntary resolution of labor disputes. We find this preference especially compelling in the case of public employees and fire fighters who are denied the right to strike and statutorily limited to *other avenues of dispute resolution including collective bargaining.*") (emphasis added); *Local 1383, Int'l Ass'n of Fire Fighters*, 411 Mich at 654 ("It is the *collective-negotiation system* that the Legislature has determined to be the appropriate method for public employers and their employees to develop and specify terms and conditions of employment.") (emphasis added).

Like the rest of PERA, the PA 349 amendments fall squarely within art 4, § 48. PERA as amended by PA 349 does not address conditions of employment generally, but rather certain

specific conditions of employment: those established for the purpose of preventing public employee strikes and labor disputes through rules and procedures for employee representation and bargaining. There is no arguable basis in the wording of § 48 or in the case law interpreting it for characterizing the PA 349 provisions outlawing agency fee agreements as somehow having little to do with "the resolution of disputes concerning public employees" or for arbitrarily extracting them from PERA's integrated regime of collective bargaining regulation. It is no surprise that the panel majority cites no precedent supporting its holding that the Legislature may selectively impose the PA 349 amendment on the civil service because, unlike the rest of PERA, it does not address employment disputes.

B. The Carve-Out For Civil Service in Art 4, § 48 Was Specifically Intended to Prevent Meddling By The Legislature in Internal Civil Service Matters.

The panel majority's conclusion that art 4, § 48's express limitation on legislation controlling public employment in the classified service does not apply to PA 349 is inconsistent with the constitutional history. The court below acknowledged the importance of the historical context and the purposes sought to be accomplished, as it must. 302 Mich App at 251 (*citing, Kearney v Bd of State Auditors*, 189 Mich 666, 673; 155 NW 510 (1915)). This Court has recognized that "the Address to the People and the constitutional convention debates may be highly relevant in determining the meaning of particular constitutional provisions to the ratifiers." *In re Request for Advisory Opinion Regarding Constitutionality of 2011 PA 38*, 490 Mich 295, 309 n 13; 806 NW2d 683 (2011).

An examination of the 1961-62 Constitutional Convention record reveals that the express carve-out for civil service in art 4, § 48 was intended to be a global limitation on legislative interference with employment relations in the classified service. Const 1963, art 4, § 48 was a new provision. Its predecessor, art 16, § 7 of Const 1908, provided "[t]he legislature may

establish courts of conciliation with such powers and duties as shall be prescribed by law." Const 1908, art 16, § 7. At the Convention, the delegates observed that the "courts of conciliation" had been used only once, and that the Legislature had acted through 1947 PA 336 to implement a dispute resolution method. 2 Official Record, Constitutional Convention 1961, p 2338. Based on these observations, the delegates proposed that the Legislature be granted "power to establish procedures for settling disputes in public employment" without specifying the procedures and leaving that decision up to future legislative sessions. *Id.* (Comment of Delegate Wood). During the debates, Delegate Hoxie stated:

> I think we have to recognize that private employees have the protection, if you can call it that, or the right to seek an opportunity to arbitrate their disputes with their employer. It was the feeling of the committee that that right should exist to public employees as well.

Id. at 2340.

Explaining the exception for civil service, Delegate Hoxie stated, "[t]he state civil service is exempted because the constitution has specific provisions for the operation of the state civil service." *Id.* at 2337. The carve out for the civil service was an acknowledgment that the exclusive constitutional basis for regulation of employment relations in the civil service is found in art 11, § 5. That art 4, §48's carve-out for the civil service was meant to preserve the Commission's independence also is evidenced by the debates over the limited legislative oversight of the Commission that was ultimately incorporated into Const 1963, art 11, § 5. In discussing a proposal that would provide the legislature with power to veto, by supermajority of both houses, the increases in rates of compensation set by the Commission, Delegate Hatch stated:

> This amendment is not offered as a means of undercutting the merit system, nor should it be construed as an attempting to return to the spoils or patronage system...The amendment is offered in the spirit of providing accountability to the

> legislature and...importantly to the people by a fourth branch of our government which heretofore has not in many respects been susceptible to the normal checks and balances. It is our hope that this language would lead to greater understanding between civil service and the legislature, and ultimately mutual respect for one another, which apparently has been lacking in the past.

1 Official Record, Constitutional Convention 1961, p 652.

The delegates and the people clearly intended the Legislature's power within the Commission's sphere of authority to be an extremely limited one:

> I would also call to the delegates' attention the 2 limitations which appear in the language; namely, that any modification would require a vote of 2/3 of the members elect of each house and that the legislature would be further prohibited from reducing rates of compensation in effect at the time of the adoption of the rate increase.

2 Official Record, Constitutional Convention 1961, p 3191. (Comments of Delegate Hatch). Other than with respect to increases in rates of compensation, the people clearly did not intend to allow legislative interference with the Commission's decisions.

C. The Cases Cited By The Panel Majority Do Not Support Legislative Usurpation of the Commission's Rulemaking Authority In This Case.

1. Cases Grounded On Countervailing Constitutional Mandates: *Jones, Marsh* and *Brown*.

Judge Saad cites civil rights cases to illustrate "the Legislature's power to enact laws applicable to all employees, including those in the classified civil service." 302 Mich App at 271 (*citing*, *Mich Dep't of Civil Rights ex rel Jones v Dep't of Civil Serv,* 101 Mich App 295; 301 NW2d 12 (1980), *lv denied*, 411 Mich 1034 (1981), and *Marsh v Dep't of Civil Serv*, 142 Mich App 557; 370 NW2d 613 (1985)(*per curiam*). *Jones* and *Marsh* stand on a very discrete and narrow legal footing. *Jones* held that the Michigan Civil Rights Commission had jurisdiction to decide sex discrimination complaints brought by classified employees; *Marsh* held that the

Elliott-Larsen Civil Rights Act and the Persons With Disabilities Civil Rights Act applied to civil service employees.

The cases are grounded in *specific* constitutional provisions that counterpose the Commission's plenary powers. *Jones* relied on Const 1963, art 5, § 29, establishing the Civil Rights Commission as a constitutional body (though dependent on enacting legislation). The court explained:

> The establishment of the CRC expressed the intent of the people of Michigan to end invidious forms of discrimination through the efforts of a single commission. If civil service had exclusive jurisdiction over all employment concerns, the result would be to weaken the authority of the CRC to carry out its constitutional mandate to end discrimination.

Jones, 101 Mich App at 301. The court in *Marsh*, relying on the analysis in *Jones*, stressed the specific constitutional purpose of the Civil Rights Commission, and the specific mandate in Const 1963, art 1, § 2 that, "[t]he legislature shall implement this section by appropriate legislation." *Marsh*, 142 Mich App at 564-567.[11] The court in *Marsh* also questioned whether employment discrimination based on suspect classifications is within the Commission's sphere of authority. *Id.* at 564 n 3.[12] As the panel majority acknowledged, "[a]t the heart of these cases is 'the fact that the constitution expressly mandates the Legislature to implement constitutional provisions prohibiting discrimination and securing civil rights of all persons.'" 302 Mich App at 273 (*quoting*, *Dep't of Transp v Brown*, 153 Mich App 773, 781; 396 NW2d 529 (1986)).

It is significant that neither of these cases cited art 4, § 49 as a source for the Legislature's authority to enact an employment law of general application covering the classified

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[11] *Marsh* stated that "this provision...not only authorizes but demands legislation prohibiting discrimination..." *Marsh,* 142 Mich App at 568.

[12] "An allegation of discrimination in employment is perhaps not best characterized as an employment dispute or grievance, nor the eradication of discrimination best viewed as the 'field' of the Civil Service Commission."

service, though according to the panel majority they should have. Instead, both cases discussed the express limitation on the Legislature's powers in art 4, § 48. *Jones*, 101 Mich App at 300; *Marsh*, 142 Mich App at 568-569; *see also, Walters v Dep't of Treasury*, 148 Mich App 809, 816; 385 NW2d 695 (1986) (*per curiam*) (holding that the Commission has concurrent jurisdiction with the courts and the Department of Civil Rights where classified employees allege a violation of their civil rights).[13]

Following *Jones* and *Marsh*, the Court of Appeals in *Dep't of Transp v Brown*, 153 Mich App 773; 396 NW2d 529 (1986), in an opinion by Judge Beasley, who also penned the *Jones* opinion, held that the Michigan Department of Labor had authority to decide a classified employee's complaint under the Michigan Occupational Health and Safety Act (MIOSHA). The court applied the approach set forth in *Jones* and *Marsh*, holding that the occupational safety and health law applies to civil service employees, specifically because, as in the civil rights cases where the court "based its conclusions on the fact that the constitution expressly mandates the Legislature to implement constitutional provisions," in that case as well "the constitution does require that the Legislature enact laws to protect the public health and safety..." *Brown*, 153 Mich App. at 781 (*citing*, Const 1963, art 4, § 51). The court also made a specific finding that art 4, § 48 does not apply to occupational safety and health. *Id.* at 782 ("In reality, the Legislature in this situation is not providing for the resolution of employment disputes involving state classified employees, but is merely securing the health and safety of all employees.)

[13] The court in *Walters* said: "We recognize that Const 1963, art 4, § 48 precludes the Legislature from enacting laws providing for the resolution of disputes concerning public employees in the State Classified Civil Service. *Marsh*, however, construed this provision by reading it in conjunction with provisions creating the Civil Rights Commission and the provisions addressing equal protection and anti-discrimination." *Walters*, 148 Mich App at 819 n 5.

The foregoing decisions provide constitutional authority for coverage of civil service employees under generally applicable legislation in the narrow class of circumstances where (1) there is an express constitutional mandate for the legislature to implement and enforce important constitutional imperatives,[14] and (2) where the subject matter is not directly tied to resolution of "disputes concerning public employees," as to which art 4, § 48 carves out the civil service.

Judge Saad's opinion suggests that this case is of a kind with the civil rights and occupational safety cases because PA 349 deals with freedom of speech, and the Legislature has authority to pass laws that "unquestionably implicate constitutional rights of both union and nonunion public employees." 302 Mich App at 278-279. We will put aside for now whether the Commission's fair share rule is a *bona fide* threat to classified employees' freedom of speech and political rights. Of importance here is the fact that the panel majority overreaches by trying to shoehorn this case into the narrow category of cases discussed above.

First, while there is no question that a proper and appropriate function of the legislative branch is to protect and promote freedom of speech, the Constitution does not expressly mandate that it do so, as it does with respect to equal protection (art 1, § 2) and the protection of public health (art 4, § 51). Michigan's free speech clause, art 1, § 5, is worded as a limitation on the Legislature's powers ("no law shall be enacted"), not as a mandate for legislative action.

Second, the panel majority mistakenly grounds its argument on *Council No 11*. 302 Mich App at 269-271. *Council No 11* actually undercuts the panel majority's point. Judge Saad's assertion that, "*Council No 11* resolved a direct conflict between a CSC rule and a legislative enactment, holding the legislation valid," 302 Mich App at 271, is misleadingly simplistic. As

[14] This point is acknowledged in Judge Saad's opinion: "At the heart of these cases is 'the fact that the constitution expressly mandates the Legislature to implement constitutional provisions prohibiting discrimination and securing civil rights of all persons.'" 302 Mich App at 273 (quoting, *Brown*, 153 Mich App at 781).

discussed above, *Council No 11* upheld application of the Political Freedom Act only to off-duty and non-job-related activities because and to the extent that that were outside the Commission's sphere of authority. *Council, No. 11*, 408 Mich at 408. *See also*, *Jones*, 101 Mich App at 301 ("The court in *Council No 11* found that although the powers of the civil service are extensive, it was beyond its power to restrict an employee's political activity when that activity is not engaged in during working hours and does not actually affect his job performance.")[15]

Council No 11 does not stand for the proposition that if the Legislature has a sufficiently compelling interest in free speech and political activity, it could enact a law permitting classified employees to engage in electioneering at the government workplace while off-duty on unpaid breaks. Had the Political Freedom Act permitted such activity contrary to the Commission's rules, it is very doubtful that the Court would have subordinated the Commission's policy decision to the Legislature's, regardless of the Legislature's views about political freedom and free speech. But according to the court below, PA 349 directly overrides the Commission's fair share collective bargaining rules -- rules directly regulating collective bargaining agreements that determine the terms and conditions applicable to classified employees while they are on duty. *Council No 11* provides no support for that unprecedented result.

2. Other Cases Addressing Matters Outside The Commission's Sphere

The panel majority also asserts that, "a wide array of statutes governing employment apply with equal force to private-sector and public-sector employees, with no exception for civil service employees." 302 Mich App at 273-274. While true, this is irrelevant. Public benefits such as workers compensation and unemployment insurance are not "conditions of employment"

[15] Putting this point aside, *Council No 11*, like the civil rights cases discussed above, cited the constitutional mandate in art 2, § 4 that the Legislature "shall enact laws" to regulate and preserve the purity of elections. *Council No 11*, 408 Mich at 395. That mandate, of course, does not extend to outlawing fair share clauses in collective bargaining agreements.

or "personnel transactions" within the civil service. They are beyond the Commission's sphere. In *Oakley v Dep't of Mental Health*, 136 Mich App 58; 355 NW2d 650 (1984 (*per curiam*), the court held that a provision of the Mental Health Code providing supplemental wage continuation benefits applied to an eligible classified employee, reasoning that the supplemental benefits were workers compensation, which has never been challenged as inapplicable to State employees. *Id.* at 63-64.[16]

D. Art 4, § 49 Does Not Provide a Constitutional Basis for Application of PA 349 to the Civil Service.

The panel majority opinion seeks to circumvent the Constitution's plain wording and the case law discussed above where PA 349 is concerned. Inasmuch as art 11, § 5 and art 4, § 48 uniformly make it clear that a law such a PA 349 could not apply to the civil service, the panel majority has no choice but to hang its hat on art 4, § 49. That section states: "The legislature may enact laws relative to the hours and conditions of employment." Const 1963, art 4, § 49. Based on the fact that art 4, § 49 and art 11, § 5 both use the term "conditions of employment," the panel majority concludes:

> The language of these two paragraphs [art 4, §§ 48 and 49], read together and in conjunction with art 11, §5, clearly indicate that the people of Michigan intended for the Legislature to retain authority over public employment disputes involving employees outside of the state classified service, and over the hours and conditions of employment over all employees, without excluding those in the classified civil service.

302 Mich App at 264.[17]

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[16] The court explained: "Article 11, § 5 speaks only of 'compensation', not disability compensation for injured employees. Also, disability compensation is not a 'condition of employment," i.e., it is not an "employment-related activity involving internal matters." *Oakely,* 136 Mich App at 63 (*quoting*, *Council No 11*, 408 Mich at 406-407).

[17] Elsewhere Judge Saad writes: "The reference to 'conditions of employment' in both Const 1963, art 4, § 49 and art 11, § 5 can be read consistently and without deviating from either section's plain language and without encroaching on or expanding the authority granted

Not until the opinion below have the courts ever spoken of attempting to reconcile the general police power under art 4, § 49 with the Commission's constitutional grant of authority to regulate the civil service. There are good reasons why this is the case.

1. Article 4, § 49 Does Not Fit Within The Narrow Category of Constitutional Mandates That Justify Legislative Interference With The Commission's Plenary Authority.

The cases discussed in Part C above, addressing the interplay between laws of general application and the Commission's regulation of civil service employment relations, discuss art 11, § 5 and art 4, § 48 as two sides of the same coin. These cases recognize what is clear from the words of the Constitution as commonly understood, as well as from the historical context: art 11, § 5 describes the sphere of the Commission's plenary powers, while art 4, § 48 correspondingly limits the legislature's powers within that sphere.

Cases such as *Jones*, *Marsh*, *Walters* and *Brown* carve out a narrow exception to the Commission's plenary authority where the countervailing constitutional clauses "expressly mandate[] the Legislature to implement constitutional provisions." *Brown*, 153 Mich App at 781. None of these cases so much as mentions art 4, § 49.[18] One obvious reason is that art 4, § 49 is not a mandate to the Legislature; it is unequivocally permissive.

2. The Specific Provisions of art 11, § 5 and Art 4, § 48 Should Be Given Precedence Over The General Provisions of art 4, § 49.

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constitutionally to either the Legislature or the CSC. Const 1963, art 4, § 49 authorizes the Legislature to enact laws relative to the hours and conditions of employment generally, subject only to the CSC's authority to *regulate* conditions of employment in the classified civil service, in addition to performing other specifically enumerated duties." 302 Mich App at 267 (emphasis in original).

[18] Art 4, § 49 would have been a natural reference for the court in *Dep't of Transp v Brown*, *supra*, inasmuch as a workplace safety law like MIOSHA arguably deals with the type of "condition of employment" contemplated in that section. The court looked instead to art 4, §51, which, unlike § 49, is a mandate to the Legislature. *Brown*, 153 Mich App at 781.

Both clauses that clearly delineate the Commission's sphere of authority and prohibit the Legislature from meddling with it are specifically targeted at public employee labor relations. Article 4, § 49 obviously is more general. It does not narrowly address government employment, as do the other two clauses; and it does not refer specifically to "resolution of disputes concerning public employees" as does art 4, § 48. This Court applies the well-settled rule that "when there is conflict between general and specific provisions in a constitution, the specific provision must control." *Advisory Opinion on Constitutionality of 1978 PA 426*, 403 Mich 631, 639-40; 272 NW2d 495 (1978). The rule is "grounded on the premise that a specific provision must prevail with respect to its subject matter, since it is regarded as a limitation on the general provision's grant of authority." *Id.* at 640 (internal citations omitted).

The panel majority makes much of the fact that art 4, § 49 and art 11, § 5 both refer to "conditions of employment." However, as the historical context discussed below makes clear, "hours and conditions of employment" as used in § 49 was intended to have a different meaning than "conditions of employment" as used in the civil service amendment. Use of the same phrase in both is an historical accident. The phrase is used in the civil service amendment in a context that expressly conveys the Commission's hegemony over a panoply of matters pertaining narrowly and specifically to public employees in the classified service. Article 4, § 48 likewise specifically and narrowly forecloses legislative "sharing of authority" with respect to collective bargaining and other dispute resolution mechanisms in the classified service.[19] These are specific expressions of popular will that should control here.

[19] The panel majority asserts that the general/specific dichotomy should be more accurately characterized in this case as a "broad/narrow dichotomy." That is: "The Legislature possesses the broad power to enact laws relative to the conditions of *all* employment, whereas the CSC possesses the narrow power to regulate conditions of civil service employment. The CSC's power to act in its limited sphere thus does not trump the Legislature's broader constitutional

3. The Panel Ignores The Historical Context.

Consideration of the historical context of art 11, § 5 and the origins of art 4, §§ 48 and 49 undercuts the panel majority's analysis. "[T]o clarify meaning, the circumstances surrounding the adoption of a constitutional provision and the purpose sought to be accomplished may be considered." *Traverse City Sch Dist v Attorney General*, 384 Mich 390, 405; 185 NW2d 9 (1971).

As discussed in Part III(B) above, art 4, § 48 was intentionally modified in the 1963 Constitution to include the civil service carve-out in order to coordinate with art 11, § 5, so that both in conjunction would clarify the limit on legislative interference with the Commission's rulemaking.

Const 1963, art 4, § 49 has a long history in Michigan's Constitution. It originated as a Progressive Era attempt to protect women and children laborers; by the time of the Constitutional Convention it had receded into obscurity as the State's police powers evolved along with the law. Its origins and history had nothing to do with regulating the terms and conditions of public employment.

As originally enacted in the 1908 Constitution, art 5, § 29 provided: "The Legislature shall have power to enact laws relative to the hours and conditions under which women and children may be employed." The amendment was upheld as constitutional a year later in *Withey v Bloem*, 163 Mich 419; 128 NW 913 (1910), as a rational exercise of the State's nascent police powers against a *Lochnerian* challenge.[20] At issue was a statute enacted pursuant to art 5, § 29

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powers." 302 Mich App at 268 (emphasis in original). This is a distinction without a difference. No matter what terminology is applied, art 11, § 5 and art 4, § 48 express the framers' and the voters' intent *specifically* with regard to civil service employees and the legislature's power to determine their conditions of employment; art 4, § 49 does not.

[20] *Lochner v New York*, 198 US 45; 25 S Ct 539 (1905).

that limited the working day for women to nine hours on average. The Court characterized the State's inchoate police powers as follows: "There inhere in the State, however, certain sovereign powers, among which powers is that characterized as the police power, which, when broadly stated, is that power of the State which relates to the conservation of the health, morals, and general welfare of the public . . ." *Withey,* 163 Mich at 426 (*quoting*, *Ritchie & Co v Wayman*, 244 Ill 509; 91 NE 695 (1910)).[21] In 1920, Const 1908 art 5, § 29 was amended to include men: "The Legislature shall have power to enact laws relative to the hours and conditions under which men, women and children may be employed." *Grosse Pointe Park Fire Fighters Ass'n v Grosse Pointe Park*, 303 Mich 405, 410; 6 NW2d 725 (1942)(upholding, under art 5, § 29, legislation establishing limits on maximum working hours for paid fire fighters). *Olson v Highland Park*, 312 Mich 688; 20 NW2d 773 (1945), decided that a state overtime law enacted pursuant to art 5, § 29 did not preempt a local overtime ordinance that was not inconsistent. *See also*, *Eanes v City of Detroit*, 279 Mich 531, 538; 272 NW 896 (1937) (identifying the legislature's authority under art 5, § 29 as an exercise of police power which must bear legitimate or reasonable relation to the public health or general welfare.)

Clearly, Const 1908, art 5, § 29 was viewed as authority for the State's regulation of hours of work and overtime. Just as clearly, art 5, § 29 was not considered a source for

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[21] The following conveys some flavor of the Court's analysis: "...woman's physical structure, and the functions she performs in consequence thereof, justify special legislation restricting or qualifying the conditions under which she should be permitted to toil." *Withey*, 163 Mich at 424 (quotation source omitted). "That woman's physical structure and the performance of maternal functions place her at a disadvantage in the struggle for subsistence, is obvious. This is especially true when the burdens of motherhood are upon her. Still again, history discloses the fact that woman has always been dependent upon man. He established his control at the outset by superior physical strength, and this control in various forms, with diminishing intensity, has continued to the present. As minors, though not to the same extent, she has been looked upon in the courts as needing especial care that her rights may be preserved." *Id.* at 425.

legislative authority to regulate public employee labor relations generally. In *Local Union No 876, IBEW v Labor Mediation Board*, 294 Mich 629; 293 NW 809 (1940), the Court upheld application of the newly-enacted Labor Mediation Act, MCL 423.1 *et seq*, to a threatened strike by municipal lighting utility workers. The Court grounded its holding in the Legislature's general police power to protect the welfare of citizens, *Local Union No 876*, 294 Mich at 635-637, and it quoted Section 19 of the Labor Mediation Act, which attributed the Act's constitutional basis to the State's general police powers, , as it does today. *Id.* at 634.[22] Const 1908, art 5, § 29 was not mentioned. The Hutchinson Act, 1947 PA 336, the predecessor to PERA, prohibited public employee strikes. *Detroit v Division 26, Amalgamated Ass'n of Street, Elec Railway & Motor Coach Employees*, 332 Mich 237; 51 NW2d 228 (1952). The Legislature's authority to enact the Hutchinson Act also was attributed to the State's police powers, not to art 5, § 29. *See*, *Detroit v DPOA*, 408 Mich 410, 450 n 20; 294 NW2d 68 (1980) ("Prior to the institution of Const 1963, art 4, § 48, such schemes were constitutionally sanctioned under the police and general welfare powers of the state.")

By the time of the Constitutional Convention, art 5, § 29 essentially was a relic -- an obscure, rarely cited throwback to an earlier era, its scope of application confined to regulation of hours of work. As streamlined in art 4, § 49 of the 1963 Constitution, it remained substantially identical to its antecedent: "The legislature may enact laws relative to the hours and conditions of employment." In first proposing that the same verbiage be continued in the 1963 Constitution, Delegate Hoxie, chairman of the committee on legislative powers, stated:

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[22] "This act shall be deemed an exercise of the police power of the state of Michigan for the protection of the public welfare, safety, prosperity, health and peace of the people; and all the provisions of this act shall be liberally construed for the accomplishment of said purposes." Labor Mediation Act, Sec. 19, MCL 423.19. Public Act 348 of 2012, the companion law to PA 349 that applies to the private sector, amended the Labor Mediation Act.

> Section 29 of article V first appeared in the 1908 constitution. It represented, at that time, a significant step forward in the area of public welfare.
>
> The committee is of the opinion that the right of the state through the legislature to regulate hours and conditions of employment and thereby safeguard the health and morals of its residents should not be open to question.
>
> Prior to the adoption of this section, there was feeling that legislation regulating working conditions was open to attack as a violation of freedom of contract. Section 29 put this doubt to rest in Michigan.
>
> The committee recommends the retention of this section, so that the constitutionality of legislation regulating hours and conditions of employment will not be questioned.

2 Official Record, Constitutional Convention 1961, p 2341. One delegate ventured his opinion that the Legislature would have basically the same powers without continuing the section, but that it would be unwise to remove it given its popularity over many years. *Id.* at 2342.

To sum up the history: the two modern constitutional provisions dealing specifically with employment conditions for public employees -- art 4, § 48 and art 11, § 5 -- were structured to harmonize by drawing a clear dividing line between the Commission's authority concerning the classified civil service and the Legislature's authority as to other public employees. The clause on which the panel majority relies to upset that stasis was enacted over a century ago to protect women of delicate constitution from working excessive hours, and it has been largely vestigial for decades.

IV. UNLESS CORRECTED, THE COURT OF APPEALS' ANALYSIS WILL TRANSFORM A CLEARLY DEFINED AREA OF LAW INTO A MINEFIELD OF CONFUSION AND AN OPEN INVITATION TO JUDICIAL POLICY-MAKING.

Based on a misreading of constitutional language and history, and ignoring a well-established body of case law, the panel majority strikes out in a new direction, in which the

Legislature and the Commission share overlapping authority to determine conditions of employment in the civil service. "This leads to the specific question here, which is where agency fees fit within this 'sharing' of constitutional responsibilities..." 302 Mich App at 274. The panel majority's approach to handling this question underscores just how arbitrary and unworkable this new constitutional regime would be if allowed to stand.

The panel majority's answer appears to be based solely on the importance the judges attribute to the perceived reasons for prohibiting fair share agreements. "In further considering whether this is within the province of the Legislature or the CSC we must examine the nature of agency fees and what interests are impacted by PA 349." 302 Mich App at 274-75. Judge Saad embarks on a lengthy analysis of the First Amendment and labor law surrounding agency fees, which he asserts is partly "in flux." 302 Mich App at 276. Following an analysis of the pros and cons of agency fees, the opinion concludes that, "Michigan has decided to leave the fray." *Id* at 276-277.

> [B]eyond the constitutional concerns implicated by the imposition of agency fees by governmental employers and unions, as a matter of public policy the decision whether to continue the practice is also within the Legislature's power.
>
> * * *
>
> [W]e hold that, contrary to plaintiffs' claim, it is within the authority of the Legislature to pass laws on public-policy matters in general and particularly those, as here, that unquestionably implicate constitutional rights of both union and nonunion public employees.

302 Mich App at 278. Judge Saad concludes: "In light of the *First Amendment* rights at stake, the Michigan Legislature has made the policy decision to settle the matter by giving all employees a right to choose." *Id* at 284.

There are at least three problems with this analysis that should raise serious concerns about how the ruling below may affect constitutional jurisprudence, if left undisturbed. The first

is that "the policy decision" here is the court's, not the Legislature's. Judge Saad's extensive legal analysis of the First Amendment implications of agency fee agreements contains not a single citation to the legislative record (which, admittedly, is scant in Michigan). While some lawmakers may have shared Judge Saad's view of the law, his legal analysis and conclusions cannot credibly be imputed to the Legislature as a whole. The danger here is evident. Rather than grounding its result in the words of the Constitution, the panel majority states, "[i]n further considering whether this is within the province of the Legislature or the CSC, we must examine the nature of agency fees and what interests are affected by PA 349." 302 Mich App at 275-276. In other words, the court resolves the constitutional question by engaging in a legal and policy debate on the Legislature's behalf. The ruling below is a naked exercise in judicial policymaking.[23]

Second, the legal analysis is wrong. Contrary to the panel majority's suggestion, the First Amendment principles surrounding agency or fair share fees have been well-settled for decades. The Supreme Court has reaffirmed repeatedly -- in cases that arose here in Michigan -- that the federal Constitution permits public employers to require non-union workers to contribute their fair share of the costs of collective bargaining, contract administration, and representation. *See Abood v Detroit Bd of Ed*, 431 US 209 (1977); *Lehnert v Ferris Faculty Ass'n*, 500 US 507 (1991); *see also*, *Davenport v Wash Ed Ass'n*, 551 US 177 (2007); *Chicago Teachers Union v Hudson*, 475 US 292 (1986); *Knox v. Service Employees Int'l Union*, 132 S Ct 2277, 2289 (2012) (declining to "revisit" *Abood*). "[T]he Court has determined that the First Amendment burdens accompanying the payment requirement are justified by the government's interest in

[23] "The shocking paucity of legal authority relied on by the lead opinion is a prime indicator that no more than naked judicial policymaking is afoot." *Anglers of the AuSable, Inc v Dep't of Env Quality*, 488 Mich 69, 91 n 1; 793 NW2d 596 (2010)(Young, Jr., CJ, dissenting).

preventing free riding by nonmembers who benefit from the union's collective-bargaining activities and in maintaining peaceful labor relations." *Locke v Karass*, 555 US 207, 213 (2009). "The constitutionality of a public employer...requiring non-union employees, as a condition of employment, to pay a fair share of the expenses of managing the collective bargaining agreement is well settled." *Lowary v Lexington Local Bd of Ed*, 854 F2d 131, 134 (CA 6, 1988).[24] The so-called "fray" is of the lower court's own making.

Third, and most significant, in purporting to "harmonize" art 4, § 49 with the civil service-related constitutional provisions, the lower court introduces the concept of "overlapping or shared authority" but suggests no discernible bright line or workable boundary. 302 Mich App at 282. The test offered by the panel majority amounts to no standard at all:

> [W]e hold that, contrary to plaintiffs' claim, it is within the authority of the Legislature to pass laws on public-policy matters in general and particularly those, as here, that unquestionably implicate constitutional rights of both union and nonunion public employees.

302 Mich App at 278.

> [T]he Legislature, as the policymaking branch of government, has the power to pass labor laws of general applicability that also apply to classified civil service employees.

Id at 279.

> The CSC is an agency created to ensure a merit system in public employment and abolish political cronyism in hiring and promotion, which it does through rules regarding matters such as pay grades, conditions for promotion, and dispute resolution. A legislature in a representative constitutional republic speaks for the people on matters of significant public concern.

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[24] Over the years, the court has defined the procedures that a union must use to notify non-members of their right to object to particular fees, *Hudson*, *Davenport*, *Knox*, and has addressed the appropriate procedures for calculating the amount of fees that may be charged to non-members. *Hudson*, *Lehnert*, *Locke*. The Commission's collective bargaining rules incorporate the settled rules.

Id at 284. If this statement of the law is left standing, almost any matter within the Commission's sphere will qualify as a "condition of employment" as to which the Commission and the Legislature "share" authority. The allocation of final authority will depend on a judge's view as to whether a piece of legislation speaks to matters of "significant public concern" or "implicates" constitutional rights. Such a flimsy and permeable "parchment barrier" will defeat the People's decision to establish an independent civil service protected from manipulation by the Legislature.[25]

[25] "Judicial decisions, like the Constitution itself, are nothing more than 'parchment barriers,' 5 Writings of James Madison 269, 272 (G. Hunt ed. 1901). Both depend on a judicial culture that understands its constitutionally assigned role, has the courage to persist in that role when it means announcing unpopular decisions, and has the modesty to persist when it produces results that go against the judges' policy preferences." *Michigan v Bryant*, 131 S Ct 1143 1176; 179 LEd2d 93 (2011) (Scalia, J., dissenting).

CONCLUSION

For the above reasons, Plaintiffs-Appellants request that the Court reverse the decision below.

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Dated: 9 April 2014

ATTORNEY GENERAL, Plaintiff-Appellant, v CIVIL SERVICE COMMISSION and STATE PERSONNEL DIRECTOR, Defendant-Appellees, UNITED AUTO WORKERS and UNITED AUTO WORKERS LOCAL 6000, Amicus Curiae.

No. 306685

COURT OF APPEALS OF MICHIGAN

2013 Mich. App. LEXIS 16

January 8, 2013, Decided

NOTICE: THIS IS AN UNPUBLISHED OPINION. IN ACCORDANCE WITH MICHIGAN COURT OF APPEALS RULES, UNPUBLISHED OPINIONS ARE NOT PRECEDENTIALLY BINDING UNDER THE RULES OF STARE DECISIS.

SUBSEQUENT HISTORY: Leave to appeal denied by, Motion granted by *AG v. Civil Serv. Comm'n, 2013 Mich. LEXIS 675 (Mich., May 1, 2013)*

PRIOR HISTORY: [*1]
Ingham Circuit Court. LC No. 11-000538-CZ.

JUDGES: Before: RONAYNE KRAUSE, P.J., and BORRELLO and RIORDAN, JJ. RIORDAN J. (dissenting).

OPINION

PER CURIAM.

Plaintiff appeals as of right from the order of the circuit court granting defendants' motion for summary disposition and denying plaintiff's motion for same.[1] This dispute concerns the constitutionality of defendants' decision to extend eligibility in the State Health Plan (SHP) to "other eligible adult individuals" (OEAI benefits), who were co-residents of state employees and nonexclusively represented employees (NEREs). We affirm.

1 Plaintiff unsuccessfully sought leave from our Supreme Court to bypass this Court's opportunity to consider the issues presented in this appeal. *Attorney General v Civil Serv Comm, 491 Mich 875; 809 NW2d 569 (2012).*

The underlying gravamen of plaintiff's challenge is that this case entails a violation of the "Michigan Marriage Amendment," *Const 1963, art 1, § 25*, and our Supreme Court's decision in *National Pride at Work v Governor, 481 Mich 56; 748 NW2d 524 (2008).* Apparently, it is plaintiff's underlying belief that defendants' decision, after extensive negotiation with the unions, to permit unmarried employees to share [*2] their health care benefits with another unrelated person is an attempt to circumvent Michigan's prohibition against recognizing any "agreement" other than "the union of one man and one woman in marriage" as "a marriage or similar union for any purpose." *Const 1963, art 1, § 25.* Our Supreme Court has recently held in *Nat'l Pride at Work* certain "domestic partnership policies" specifically and explicitly intended to confer benefits on same-sex partners violated the Marriage Amendment. The policies at issue here, however, are significantly different.

Critically, *Nat'l Pride at Work* entailed policies that were specifically and explicitly intended to confer benefits on same-sex partners in close relationships with the employees. See *Nat'l Pride at Work, 481 Mich at 63-67.* Our Supreme Court concluded that the domestic

partnerships under discussion were being treated as "marriage[s] or similar union[s]" within the meaning of the Marriage Amendment. *Id.* at 86-87. However, although our Supreme Court concluded that the Marriage Amendment precluded recognition of domestic partnerships for purposes of providing health-care benefits, our Supreme Court did *not* resolve that health-care benefits are **[*3]** a specific benefit of marriage or that the Marriage Amendment somehow precludes employers from offering health-care benefits to people other than spouses of employees. See *id. at 78 n 18*. Consequently, there is no absolute prohibition against same-sex domestic partners receiving benefits through their relationship with an employee *so long as* that receipt is not based on the employer's recognition of that relationship as a "marriage or similar union."

In contrast to the policies under discussion in *Nat'l Pride at Work*, the policy at issue here is, in relevant part, as follows:

> Where the employee does not have a spouse eligible for enrollment in the [SHP], the Plan shall be amended to allow a participating employee to enroll one Other Eligible Adult Individual, as set forth below:
>
> To be eligible, the Individual must meet the following criteria:
>
> 1. Be at least 18 years of age.
>
> 2. Not be a member of the employee's immediate family as defined as employee's spouse, children, parents, grandparents or foster parents, grandchildren, parents-in-law, brothers, sisters, aunts, uncles, or cousins.
>
> 3. Have jointly shared the same regular and permanent residence for at least 12 continuous months, and continues **[*4]** to share a common residence with the employee other than as a tenant, boarder, renter or employee.
>
> Dependents and children of an Other Eligible Adult Individual may enroll under the same conditions that apply to dependents and children of employees.
>
> In order to establish that the criteria have been met, the employer will require the employee and Other Eligible Adult Individual to sign an Affidavit setting forth the facts which constitute compliance with those requirements.

This policy is unambiguously completely gender-neutral. Furthermore, while it does not allow married employees to share their benefits with anyone other than spouses and does not allow employees to share their benefits with close blood relations, it does not depend on the employee being in a close relationship of any particular kind with the OEAI beyond a common residence. The Marriage Amendment prohibits recognizing certain kinds of agreements as "marriage[s] or similar union[s];" it does not in any way prohibit incidentally benefiting such agreements, particularly where it is clear that an employee here could share benefits with a wide variety of other people.[2]

> 2 For example, an employee could share benefits with a **[*5]** same-sex boyfriend or girlfriend, but the same employee could also share those benefits with an opposite-sex boyfriend or girlfriend, or with a nonromantic best friend, or a mere housemate. We would not think it impossible, or even unlikely, that any two people of any sex might share a friendship close enough to give rise to a shared domicile and a desire to share health care benefits. Considering the present state of the economy and prevalence of shared housing for reasons that may involve simple economics, we think it unreasonable to predict same-sex domestic partnerships to necessarily be the most-benefitted group under this policy.

Plaintiff also asserts a violation of the Michigan Equal Protection Clause. *Const 1963, art 1, § 2*. The scope and standard of the Michigan Equal Protection Clause are coextensive with those rights protected by the

federal Equal Protection Clause. *Doe v Dep't of Social Servs, 439 Mich 650, 670-674; 487 NW2d 166 (1992)*; see US Const, Am 14. While equal protection generally requires that similarly situated individuals be treated similarly, "it is well established that even if a law treats groups of people differently, it will not necessarily violate the **[*6]** guarantee of equal protection." *Id. at 661*. Accordingly, not all discriminatory classifications will be held to violate the Equal Protection Clause. *Harvey v State, 469 Mich 1, 6-7; 664 NW2d 767 (2003)*. Unless the action infringes on a fundamental right, discriminates against a "suspect" classification (such as race, ethnicity or national origin), or discriminates against a "quasi-suspect" classification invoking intermediate scrutiny (gender or illegitimacy), the state action is analyzed under rational basis review. *Id. at 7, 12*.

"[M]arital status classifications have never been accorded any heightened scrutiny under the Equal Protection Clause," as it is not a suspect class and the state may have good reason for discriminating on the basis of marital status. *In re Request for Advisory Opinion Regarding Constitutionality of 2011 PA 38, 490 Mich 295, 328 n 34; 806 NW2d 683 (2011)*. Indeed, "[s]uspect classes are those that have been subjected to a history of purposeful unequal treatment, or have been relegated to a position of political powerlessness requiring protection." *Wysocki v Kivi, 248 Mich App 346, 366; 639 NW2d 572 (2001)*. Although the right to marry is a protected fundamental **[*7]** right, the OEAI benefits policy in no way impairs public employees' right to marry. *Loving v Virginia, 388 U.S. 1, 12; 87 S Ct 1817; 18 L Ed 2d 1010 (1967)*; *Zablocki v Redhail, 434 U.S. 374, 383-387; 98 S Ct 673; 54 L Ed 2d 618 (1978)*. The Civil Rights Act (CRA), *MCL 37.2101 et seq.*, did not expand the list of suspect classifications granting heightened scrutiny in the Michigan Equal Protection Clause to include marital status. *Dep't of Civil Rights ex rel Forton v Waterford Twp of Parks and Recreation, 425 Mich 173, 189-190; 387 NW2d 821 (1986)* (noting that CRA expanded the scope, not the standard, of the guarantees in the Equal Protection Clause).

Likewise, the United States Supreme Court has acknowledged several familial association rights that were protected under the federal Constitution, including: (1) the right to parent children without interference from the state; (2) the right of family members to reside together; and (3) the right to procreate. *Zablocki, 434 U.S. at 386*; *Moore v City of East Cleveland, Ohio, 431 U.S. 494, 504-506; 97 S Ct 1932; 52 L Ed 2d 531 (1977)*; *Meyer v Nebraska, 262 U.S. 390, 402-403; 43 S Ct 625; 67 L Ed 1042 (1923)*. However, close relatives are not **[*8]** a suspect/quasi-suspect classification that warrants heightened judicial scrutiny. *Lyng v Castillo, 477 U.S. 635, 638; 106 S Ct 2727; 91 L Ed 2d 527 (1986)*. The *Lyng* Court also held that discriminatory economic policies against close relatives regarding the provision of benefits does not implicate fundamental rights, unless doing so directly and substantially prevents family members from living together. *Id. at 638-639*. Additionally, close relatives are not a class of persons that has suffered a history of "purposeful unequal treatment," or are in "a position of political powerlessness." *Wysocki, 248 Mich App at 366*.

The policy at issue is strictly gender-neutral and does not in any way implicate race, ethnicity, national origin, or illegitimacy. The policy does not invoke any fundamental right. Consequently, we review defendants' policy under rational basis review.

Plaintiff argues that the policy at issue here violates equal protection by excluding married employees from sharing their benefits with persons other than their spouses and by excluding employees from sharing their benefits with blood relatives. Quite bluntly, we agree wholeheartedly that those restrictions strike us as **[*9]** absurd and unfair. The restrictions excluding married employees from sharing their benefits with persons other than their spouses and excluding employees from sharing their benefits with blood relatives strike us as ridiculous. For example, at oral argument, the situation was posed that an employee could share his or her benefits with a fraternity brother but not an actual brother. Likewise, if a married employee's spouse has his or her own health benefits, that employee would be precluded from sharing his or her benefits with, say, an adult child, or, for that matter, anyone else. Indeed, the assistant attorney general conceded at oral argument that if "everyone was in," the policy would be acceptable. These restrictions are nothing short of ridiculous.

However, our subjective determination of absurdity is not the standard by which we review a policy for an equal protection violation. Under the rational basis standard of review, a state's action will be upheld so long as it is rationally related to advancing a legitimate state purpose. *Id. at 7*. Because statutes or rules are presumed constitutional under rational basis review, the challenger

has the burden of showing the action was [*10] arbitrary and rationally unrelated to the state interest. *Id.* The state actor's actual motivations are irrelevant, and the action will be constitutional so long as it is supported by "any set of facts, either known or which could reasonably be assumed, even if such facts may be debatable." *Id.*

Significantly, "[t]o prevail under this highly deferential standard of review, a challenger must show that the legislation is arbitrary and wholly unrelated in a rational way to the objective of the statute." *People v Idziak, 484 Mich 549, 571; 773 NW2d 616 (2009)* (quotations omitted). "Rational-basis review does not test the wisdom, need, or appropriateness of the legislation, or whether the classification is made with 'mathematical nicety,' or even whether it results in some inequity when put into practice." *Id.* (quotation omitted). Rather, "[a] rational basis exists for the legislation when any set of facts, either known or that can be reasonably conceived, justifies the discrimination." *Morales v Parole Bd, 260 Mich App 29, 51; 676 NW2d 221 (2003).* Such finding may be based on "rational speculation unsupported by evidence or empirical data." *FCC v Beach Communications, Inc, 508 U.S. 307, 316; 113 S Ct 2096; 124 L.Ed.2d 211 (1993).* [*11] "[I]n other words, the challenger must 'negative every conceivable basis which might support' the legislation." *TIG Ins Co, Inc v Dep't of Treasury, 464 Mich 548, 558; 629 NW2d 402 (2001),* quoting *Lehnhausen v Lake Shore Auto Parts Co, 410 U.S. 356, 364; 93 S Ct 1001; 35 L Ed 2d 351 (1973)* (emphasis added). Consequently, our subjective assessment of a policy as seemingly absurd is irrelevant: the question is only whether the policy could plausibly be said to possibly advance any legitimate government interest, an exceedingly low standard.

Under this exceedingly low standard, it is not the place of the courts to second-guess the "wisdom, need, or appropriateness of the" state action. *Phillips v Mirac, Inc, 470 Mich 415, 434; 685 NW2d 174 (2004).* As noted above, this is even more important because we agree that defendants had to "draw the line" at some point. *Fritz, 449 U.S. at 179.* Defendants' policy was crafted through negotiation and bargaining with the unions, and pursuant to the negotiations the policy excluded married persons and close relatives. The exclusion of the cited groups from the OEAI benefits policy does not clearly demonstrate that the policy is arbitrary or unrelated [*12] to the state's interests. The policy appears to serve the negotiated, bargained-for needs of the individuals affected, and so we conclude that the policy passes muster under rational basis scrutiny. We do hope, however, that defendants will see fit and be able to strengthen the policy by eliminating the exceptions we have discussed.[3]

> 3 It is worth pointing out that the restriction on OEAIs being co-residents of the employees has not been challenged as in any way unreasonable. One could make the argument, at least in theory, that the policy discriminates against people in long-distance relationships. However, again, defendants do have to "draw the line" somewhere.

Plaintiff also contends that defendants lack the constitutional authority to implement the OEAI benefits policy. We disagree.

The Michigan Constitution delegates plenary and exclusive authority to defendants in order to set compensation and conditions of employment for public employees. *Const 1963, art 11, § 5; AFSCME Council 25 v State Employees Retirement Sys, 294 Mich App 1, 15; 818 NW2d 337 (2011).* Defendants' authority to set compensation is within the scope of their constitutionally delegated authority, which is only subject [*13] to other constitutional limitations, like equal protection, that were established when the Michigan Constitution was adopted. *AFSCME Council 25, 294 Mich App at 8; Hanlon v Civil Serv Comm, 253 Mich App 710, 718; 660 NW2d 74 (2002).*; Const 1963. When the people of Michigan ratified the Michigan Constitution in 1963, the rights guaranteed under the Equal Protection Clause did not include "marital status," so this limitation is not constitutionally binding on defendants. Because the CRA is a matter of statutory law, it lacks the authority to impair defendants' authority. *MCL 37.2102,* 1976 PA 453. Holding otherwise would allow the Legislature to circumvent the Michigan Constitution and bypass defendants' constitutional mandate.

Plaintiff also argues that the OEAI benefits do not constitute "compensation" under *Const 1963, art 11, § 5.* This Court has defined "compensation" under this constitutional provision as meaning "something given or received for services, debt, loss, injury, etc." *AFSCME Council 25, 294 Mich App at 23.* Although our Supreme Court has never decided whether health insurance qualifies as compensation, it has held in a different context that some fringe benefits (including [*14] pensions, clothing allowances, and life insurance

premiums) are "compensation" because they were "not a gratuity, but a part of the stipulated compensation" pursuant to their contracts. *Kane v City of Flint, 342 Mich 74, 80-83; 69 NW2d 156 (1955).*

This Court previously held in an older case that "hospitalization, medical, and dental insurance should not be included" as compensation. *Gentile v Detroit, 139 Mich App 608, 618; 362 NW2d 848 (1984).* Although this decision is no longer binding on this Court pursuant to *MCR 7.215(J)(1),* it is nevertheless persuasive in terms of interpreting the meaning of "compensation." However, both *Kane* and *Gentile* have limited value in resolving this legal question, as those cases involved the definition of "compensation" as used in their respective city ordinances. *Kane, 342 Mich at 76*; *Gentile, 139 Mich App at 612-613.*

Relying on the only published authority in Michigan interpreting the meaning of "compensation" in our Constitution, the OEAI benefits qualify as compensation because they are provided in exchange for services rendered by public employees. This is consistent with the dictionary definition found in Random House Webster's College Dictionary **[*15]** (2001 ed) of "something given or received for services, debt, loss, injury, etc." It is also consistent with the dictionary definition found in Black's Law Dictionary (8th ed) of "[r]enumeration and other benefits received in return for services rendered; esp., salary or wages" but noting that such disparate things as stock options, profit sharing, vacations, medical benefits, and disability can also be compensation. We perceive no reason to artificially limit the definition. These benefits were obviously of value to the employees, because they were specifically negotiated for by the unions--consequently, they certainly appear to be part of what the workers expect to receive in exchange for their labor. As noted earlier, it is reasonable to believe that eligibility in the SHP would attract potential employees or retain existing ones. Therefore, these benefits are not gratuities or perks, but are rather compensation for services rendered.

In summary, we find that the benefits-sharing policy at issue in this case is within defendants' authority to implement, does not violate equal protection and does not violate the Marriage Amendment. The trial court is therefore affirmed.

/s/ Amy Ronayne **[*16]** Krause

/s/ Stephen L. Borrello

DISSENT BY: RIORDAN

DISSENT

RIORDAN J. (*dissenting*)

For the reasons set forth below, I respectfully dissent from the majority's opinion.

A rational basis standard of review is highly deferential and compels "a challenger [to] show that the legislation is arbitrary and wholly unrelated in a rational way to the objective of the statute." *Crego v Coleman, 463 Mich 248, 259; 615 NW2d 218 (2000)* (quotation marks and citation omitted). "A classification reviewed on this basis passes constitutional muster if the legislative judgment is supported by any set of facts, either known or which could reasonably be assumed, even if such facts may be debatable." *Heidelberg Bldg, LLC v Dep't of Treasury, 270 Mich App 12, 18; 714 NW2d 664 (2006).*

There are no facts in the record to support the trial court's conclusory holding that the OEAI provision is, or is not, supported by a rational basis. Despite the attorney general's contention that the proffered reasons were illogical, the trial court performed no inquiry into whether they were supported by anything, even if debatable, in the record. Instead, the trial court simply adopted the proffered justifications as being factual.

Undoubtedly, a rational **[*17]** basis standard of review is highly deferential. However, that deference is not the equivalent of there being no standard of review at all. A court may not abdicate its duty to actually review the proffered justifications and any opposition to them. It must discern whether there is anything in the record to undermine or, in the alternative, support the justifications. From my review of the record, it cannot be said that the OEAI provision is directed at any identifiable purpose or discrete objective in relation to the proffered goal of attracting and retaining a qualified work force.

Further, if the purpose of the OEAI provision is to attract and retain a qualified work force, there is no rational basis to arbitrarily draw the line between unmarried and married employees or related and unrelated individuals. This arbitrary distinction is irrational, as there is nothing in the record to suggest that unmarried individuals or individuals with unrelated

cohabitants are somehow more qualified, superior employees or that it is much more difficult for the State to attract such persons to become employees and then retain them. In essence, "[t]he *breadth* of the [provision] is so far removed from **[*18]** these particular justifications that" it is "impossible to credit them." *Romer v Evans, 517 U.S. 620, 635; 116 S Ct 1620; 134 L Ed 2d 855 (1996)* (emphasis added).

While honoring the collective bargaining process certainly is important, it cannot be done in violation of the constitution. The OEAI provision endorses an arbitrary distinction between classes of people based on familial relations, with no rational basis and no factual basis for such a distinction. Thus, it is a status-based enactment divorced from any factual context from which could be discerned a relationship to legitimate state interests. *Romer, 517 U.S. at 635*. "[I]t is a classification of persons undertaken for its own sake, something the Equal Protection Clause does not permit." *Id.*

Equal protection is not achieved through the indiscriminate imposition of inequalities. Respect for this principle explains why laws singling out a certain class of citizens for disfavored legal status, or general hardship, are rare. *Romer, 517 U.S. at 633*. Because the OEAI provision makes it impermissible for one group of citizens, as opposed to another, to receive a government benefit, without there being any identifiable, rational basis **[*19]** for doing so, it is a denial of equal protection under the law.

For these reasons, the OEAI provision "is arbitrary and wholly unrelated in a rational way to the objective of the [provision]." *Crego, 463 Mich at 259*. As it is written, the OEAI provision is unlawful and the lower court's opinion should be reversed.

/s/ Michael J. Riordan